STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	FOR PUBLICATION February 1, 2011
v	No. 290772 Wayne Circuit Court
SHAUN DAVID BARBARICH, Defendant-Appellee.	LC No. 08-012609-AR Advance Sheets Version

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

GLEICHER, P.J. (*dissenting*).

Today the majority empowers private citizens to select certain motorists for warrantless searches and seizures conducted by police officers lacking probable cause or any reasonable suspicion of criminal conduct. Because the Fourth Amendment prohibits seizures premised on accusations utterly devoid of objective or specific facts, I respectfully dissent.

Michigan State Police Officer Christopher Bommarito testified that he initiated a traffic stop of defendant Shaun Barbarich's truck immediately after a woman driving a red pickup truck pointed to Barbarich's vehicle and mouthed the words "almost hit me." Bommarito recalled that he probably read the woman's lips because the windows of her vehicle and his were likely closed. Bommarito admitted that he possessed no other facts or information about the woman or Barbarich when he decided to make the stop:

> *Q.* And so at the time that she mouthed that, did—when did you turn on your overheads?
>
> *A.* I immediately turned my patrol car around and turned my emergency lights and sirens on to initiate a stop on that vehicle.
>
> *Q.* Okay. So, at that point-in-time, when you saw what you thought was her mouthing that he almost hit me, you immediately decided at that point-in-time to stop Mr. Barbarich?
>
> *A.* Correct.

Bommarito acknowledged that he made no attempt to look for the driver of the red pickup truck and could provide no information about her.

The majority concludes, "The woman's action of pointing to the vehicle in front of her was sufficient to accurately identify defendant's vehicle and provided precise and verifiable information to the officer, which also strongly suggests that the information was reliable." *Ante* at 7. According to the majority, "[T]he fact that the tipster was actually face to face with Bommarito when she relayed the tip, and thus likely knew that she could be subject to police questioning, further indicates that she was credible and that the information she provided was reliable." *Ante* at 7. In reaching these conclusions, the majority substantially relies on a decision of the United States Court of Appeals for the Eighth Circuit, *United States v Wheat*, 278 F3d 722 (CA 8, 2001). I respectfully disagree that the information available to Bommarito qualified as "precise and verifiable" and that it supplied a reasonable basis for stopping defendant and his vehicle. Furthermore, I believe that *Wheat* may be readily distinguished from the facts presented here.

The protections afforded by the Fourth Amendment "extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v Arvizu*, 534 US 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002). In *Terry v Ohio*, 392 US 1, 21; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court explained that "specific and articulable facts" must exist to justify an intrusion on the constitutionally protected interests of a private citizen. "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v Cortez*, 449 US 411, 417; 101 S Ct 690; 66 L Ed 2d 621 (1981). These Supreme Court cases, and innumerable others, instruct that the Fourth Amendment tempers a police officer's power to detain a motorist by measuring the appropriateness of a warrantless seizure against an objective standard that demands particularized evidence of lawbreaking.

To satisfy the Fourth Amendment's objective standard, a police officer must be able to articulate more than "an 'inchoate and unparticularized suspicion or "hunch" of criminal activity.'" *Illinois v Wardlow*, 528 US 119, 123-124; 120 S Ct 673; 145 L Ed 2d 570 (2000), quoting *Terry*, 392 US at 27. Indisputably, an informant's tip may supply reasonable suspicion that a crime has been or is about to be committed. In *Adams v Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), the United States Supreme Court "extended the *Terry* stop and frisk rationale to situations in which the stop and frisk was prompted by an unverified tip from an informant." *People v Tooks*, 403 Mich 568, 576; 271 NW2d 503 (1978). The informant in *Adams* "was known to [the officer] personally and had provided him with information in the past." *Adams*, 407 US at 146. The Supreme Court also noted that the information given by the informant "was immediately verifiable at the scene" when the police officer saw a weapon in the defendant's waistband. *Id*.

In *Tooks*, 403 Mich at 577, the Michigan Supreme Court considered whether information relayed by a citizen-informant, "as opposed to a known informant," could supply reasonable suspicion for a search. The *Tooks* informant, "an unidentified citizen," approached police officers with a detailed description of a man who had allegedly shown a gun to two other men. *Id*. at 573-574. A short distance from the location of their meeting with the informant, the officers "encountered three males matching the descriptions given by the citizen," conducted a pat-down search of the defendant, and found a concealed pistol. *Id*. at 574. Although the Michigan Supreme Court in *Tooks* repudiated the idea that information supplied by a citizen-informant is inherently unreliable, the Court stopped well short of clothing a citizen-informant's

tip with a presumption of credibility. See *id*. at 577-582. Rather, the Court held that "information provided to law enforcement officers by concerned citizens who have personally observed suspicious activities is entitled to a finding of reliability *when the information is sufficiently detailed and is corroborated within a reasonable period of time by the officers' own observations*." *Id*. at 577 (emphasis added). Applying the standards from *Terry* and *Adams*, the Supreme Court set forth "three related factors" that a court must consider "[i]n determining whether the information from the citizen-informant carried enough indicia of reliability to provide the officers with a reasonable suspicion . . . ." *Id*. The three factors are "(1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors." *Id*.

In finding reliable the information supplied by the informant in *Tooks*, our Supreme Court drew heavily on the second factor, which concerns the specificity of the informant's information:

> This finding is enhanced by and is especially true in light of the second related factor; the detailed information provided regarding the suspects which allowed independent verification by the police of any persons investigated pursuant to that information. The importance of the preciseness of description allowing independent verification is great, as demonstrated by *Draper v United States*, 358 US 307; 79 S Ct 329; 3 L Ed 2d 327 (1959), where an informant's information was found to give police sufficient probable cause to arrest . . . . This kind of detail not only enhances the reliability of the information, but prevents the danger of widespread intrusion by indiscriminate stopping and frisking of members of the public. [*Tooks*, 403 Mich at 578-579.]

The Court later emphasized that it was "impressed with the detail and preciseness of the information given to the officers." *Id*. at 579-580. Moreover, the citizen-informant's information "was verified by the officers very shortly after it was given to them and within a few blocks of the location in which the officers had been given the information." *Id*. at 580.

In *Florida v JL*, 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000), the United States Supreme Court again considered whether police action based on an anonymous tip by a citizen-informant withstood Fourth Amendment scrutiny. The anonymous tipster in that case reported "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." *Id*. at 268. Shortly after the police arrived, they found three black males at the bus stop, one of whom wore a shirt consistent with the informant's description. "Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct." *Id*. An officer frisked the defendant and found a weapon. The Supreme Court observed that the anonymous call offered "no predictive information and therefore left the police without means to test the informant's knowledge or credibility." *Id*. at 271. The Supreme Court additionally emphasized that "[a]ll the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the defendant]." *Id.* Ultimately, the Supreme Court rejected the argument that the tip conveyed reasonable suspicion merely because it included "[a]n accurate description of a subject's readily observable location and appearance . . . ." *Id*. at 272. As most

relevant here, the Supreme Court instructed that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id*.

In assessing whether a police officer possessed reasonable suspicion to stop a vehicle, courts have to take into account both the quantity (content) and quality (reliability) of the available information. *Alabama v White*, 496 US 325, 330; 110 S Ct 2412; 110 L Ed 2d 301 (1990). In this case, the sum of the quantity and quality of Bommarito's knowledge amounted to a decidedly small measure. In my calculus, Bommarito lacked any basis on which to judge the reliability of the passing motorist's allegation. When the woman drove off, Bommarito was "without means to test the informant's knowledge or credibility." *JL*, 529 US at 271. Furthermore, the content of the woman's accusation, "almost hit me," gave Bommarito no objective, verifiable basis to suspect Barbarich of violating a law. I will address separately these distinct concepts.

Although the woman in the oncoming pickup truck came face to face with Bommarito for a second or two, Bommarito did not know her or where he could locate her again. Bommarito conceded that he did not have an opportunity to observe the woman's license plate because "my focus was on that vehicle that she pointed out to me." Therefore, Bommarito had no information to help him assess the informant's veracity or her motive in making the accusation against Barbarich, and he entirely lacked any data validating the reliability of the information she relayed. The majority asserts that "the fact that the tipster was actually face to face with Bommarito when she relayed the tip, and thus likely knew that she could be subject to police questioning," enhances her credibility and the reliability of her tip. *Ante* at 7. But no evidence of record tends to establish that the woman "likely knew" that Bommarito could question her; the majority appears to have conjured this "fact" from thin air. To the contrary, Bommarito admitted that he did not know where the woman traveled after he "went to stop [Barbarich's] vehicle." Bommarito also conceded that he made no attempt to look for the woman. In my view, the woman's departure from the scene entirely undermines the majority's characterization of her reliability, credibility, and general good citizenship. The woman's absence also distinguishes this case from *People v Estabrooks*, 175 Mich App 532, 536-537; 438 NW2d 327 (1989), in which this Court noted, "[T]he fact that the [informant] was actually present and accusing defendant immediately after the rear-endings indicated reliability on the part of the informant." By deliberately limiting her interaction with Bommarito to merely a passing moment, the informant in this case neither placed her anonymity at risk nor bolstered her reliability.

Furthermore, the unique situation here, a lip-read tip delivered by a rapidly passing motorist, shares no pertinent similarities to those face-to-face tips that are entitled to a finding of reliability. Usually, "[a] face-to-face encounter provides police officers the opportunity to perceive and evaluate personally an informant's mannerisms, expressions, and tone of voice (and, thus, to assess the informant's veracity more readily than could be done from a purely anonymous telephone tip)." *United States v Romain*, 393 F3d 63, 73 (CA 1, 2004). "[A] face-to-face encounter often provides a window into an informant's represented basis of knowledge . . . ." *Id*. In this case, Bommarito had no meaningful opportunity to assess the woman's demeanor or detect any emotion in her voice. The "window into [the woman's] represented basis of knowledge" remained closed. *Id*. Given the profound dearth of information available to Bommarito about the tipster, I score the quality of her information at close to zero.

Moreover, the woman supplied Bommarito with only a bare conclusion: "Almost hit me." This declaration contained no detail concerning the circumstances of the alleged near miss or any facts from which Bommarito could reasonably conclude that Barbarich had likely violated any law. In countless situations drivers "almost hit" each other without either being drunk or driving recklessly. Barbarich may have been momentarily inattentive and failed to keep the proper distance between his truck and the woman's. Alternatively, Barbarich may have pulled out of a parking lot without making a proper observation or changed lanes without first ascertaining whether another vehicle occupied the lane he entered. Barbarich could have been talking on a cell phone or adjusting the radio, causing him to negligently swerve too close to the woman's truck. An anonymous tip that one driver has "almost hit" another simply fails to substantiate that the offending driver was illegally operating his vehicle.[1] Although the majority suggests that Bommarito inferred that Barbarich was driving illegally, this inference rested on no more than "an inchoate and unparticularized suspicion or hunch" and does not amount to reasonable suspicion for stopping a vehicle. *Wardlow*, 528 US at 124 (citation and quotation marks omitted). If the United States Supreme Court's admonition in *JL*, 529 US at 272, that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person" means anything, it mandates that a police officer possess some articulable basis for suspecting a crime before detaining a citizen. Bommarito articulated no basis here, aside from the tip.

However, even assuming that Bommarito legitimately translated "almost hit me" into "driving recklessly," MCL 257.742(3) circumscribed as follows Bommarito's authority to stop a vehicle:

> A police officer may issue a citation to a person who is a driver of a motor vehicle involved in an accident when, based upon personal investigation, the officer has reasonable cause to believe that the person is responsible for a civil infraction in connection with the accident. *A police officer may issue a citation to a person who is a driver of a motor vehicle when, based upon personal investigation by the police officer of a complaint by someone who witnessed the person violating this act or a local ordinance substantially corresponding to this act, which violation is a civil infraction, the officer has reasonable cause to believe that the person is responsible for a civil infraction* and if the prosecuting attorney or attorney for the political subdivision approves in writing the issuance of the citation. [Emphasis added.]

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[1] In this regard, the instant case is additionally distinguishable from *Estabrooks*. In that case, the informant advised a police officer that the defendant had rear-ended his motorcycle several times. *Estabrooks*, 175 Mich App at 534. This Court pointed out that although an "officer may not stop a driver for a civil infraction solely on the basis of a witness' complaint," *id*. at 537, citing MCL 257.742(3), the informant's information formed an ample basis for charging the defendant with a misdemeanor, *id.* at 538.

The Michigan Vehicle Code, MCL 257.1 *et seq*., proscribes reckless driving, which it defines as driving "in willful or wanton disregard for the safety of persons or property . . . ." MCL 257.626(2). Absent any further description of Barbarich's driving, no evidence tended to prove that Barbarich had operated his vehicle in a manner consistent with willful or wanton disregard for the safety of persons or property. The vehicle code also proscribes careless or negligent driving, which includes vehicle operation in a "careless or negligent manner likely to endanger any person or property, but without wantonness or recklessness . . . ." MCL 257.626b. But the statement "almost hit me," without more information, hardly establishes reasonable cause to believe that Barbarich had driven inattentively or with indifference to his surroundings and falls far short of supplying the requisite evidence of a civil infraction.

Even if the woman's declaration could be construed as conveying that Barbarich had driven carelessly or recklessly, Bommarito nevertheless lacked the authority to stop Barbarich's truck. At most, the tip suggested that Barbarich had committed a civil infraction. A civil infraction "is not a crime" under Michigan law, MCL 257.6a, and the probable-cause standard applies to vehicle stops premised on civil infractions. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996). The United States Supreme Court explained in *Whren* that in civil infraction situations, the probable-cause standard affords the "quantum of individualized suspicion necessary to ensure that police discretion is sufficiently constrained." *Id*. at 817-818 (citation and quotation marks omitted); see also *United States v Freeman*, 209 F3d 464, 466 (CA 6, 2000). In light of the vague, conclusory nature of the woman's tip, Bommarito unquestionably did not possess probable cause to stop Barbarich for a traffic violation.

In my view, the majority ignores the critical difference between stopping a vehicle on the basis of a tip suggesting a crime in progress and a tip hinting at the commission of a civil traffic offense. Relying largely on *Wheat*, 278 F3d 722, the majority decries the danger attendant on waiting "to personally observe defendant engage in dangerous and erratic driving . . . ." *Ante* at 7. But here, unlike in *Wheat*, the evidence available to the arresting officer simply did not support the conclusion that the tipster had witnessed the erratic, dangerous maneuvers of a drunk driver. In *Wheat*, the Eighth Circuit described as follows the facts available to the arresting officer:

> On May 3, 1996, a motorist used his cellular phone to place a 9-1-1 call to the Blairsburg, Iowa Police Department. The caller reported that a tan- and cream-colored Nissan Stanza or "something like that," whose license plate began with the letters W-O-C, was being driven erratically in the northbound lane of Highway 169, eight miles south of Fort Dodge, Iowa. *The caller complained that the Nissan was passing on the wrong side of the road, cutting off other cars, and otherwise being driven as if by a "complete maniac."* The 9-1-1 operator did not ask the caller to identify himself.
>
> Police dispatchers relayed the caller's tip to patrolling officers. Shortly thereafter, Officer Paul Samuelson observed a tan Nissan Maxima whose license plate began with the letters W-O-C, stopped in the northbound lane of Highway 169 at the intersection of Highway 20. The Nissan made a right turn, and Officer

> Samuelson stopped it immediately, without having observed any incidents of erratic driving. [*Id*. at 724-725 (emphasis added).]

The details offered by the *Wheat* tipster gave rise to a reasonable inference that the driver of the Nissan was driving while impaired. The Eighth Circuit expressly recognized the importance of the tip's specificity: "In all cases . . . the more extensive the description of the alleged offense, the greater the likelihood that the tip will give rise to reasonable suspicion." *Id*. at 732 n 8. The court emphasized that a tip justifying a stop "must also contain a sufficient quantity of information to support an inference that the tipster has witnessed an actual traffic violation that compels an immediate stop. A law enforcement officer's mere hunch does not amount to reasonable suspicion . . . ; *a fortiori*, neither does a private citizen's." *Id*. at 732. In stark contrast, the tip at issue here gave no information concerning the circumstances of the near miss and no objective data on which to ground a conclusion that Barbarich was drunk. "[I]f failure to follow a perfect vector down the highway or keep[] one's eye on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy." *Freeman*, 209 F3d at 466 (citation and quotation marks omitted).

Finally, I respectfully take issue with the majority's rationalization of its decision by means of the precept that "the higher the governmental interest, the more likely a warrantless search or seizure is to be reasonable, especially if the implicated individual interest is low." *Ante* at 3. In *Delaware v Prouse*, 440 US 648, 654; 99 S Ct 1391; 59 L Ed 2d 660 (1979), the United States Supreme Court explained that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Protection of the public against the danger of drunk driving certainly qualifies as a legitimate governmental interest worthy of promotion. But

> [a] central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. [*Brown v Texas*, 443 US 47, 51; 99 S Ct 2637; 61 L Ed 2d 357 (1979) (citation omitted).]

In this case, the tip provided Bommarito with an accusation suggesting that perhaps Barbarich had driven carelessly. However, the tipster offered no specific, objective facts reasonably establishing that Barbarich was driving while impaired. "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v United States*, 413 US 266, 273; 93 S Ct 2535; 37 L Ed 2d 596 (1973).

I would hold that an uncorroborated tip from an unidentifiable source lacking any pertinent detail and suggesting only an ordinary traffic violation cannot serve as a vehicle for violating the Fourth Amendment, and thus dissent.

/s/ Elizabeth L. Gleicher